NO. 80-792

In The

Supreme Court Of The United States

OCTOBER TERM, 1980

JEROME JANUSZEWSKI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

RESPONDENT,
STATE OF CONNECTICUT

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Supreme Court of Connecticut commit error in affirming the Trial Court's denial of the defendant's Motion to Suppress ten pounds of marijuana seized from the front seat area of defendant's vehicle?

II. Did the Supreme Court of Connecticut err in affirming the Trial Court's refusal to suppress inculpatory statements made by the defendant to the police officer?

III. Did the Supreme Court of Connecticut err in approving the Trial Court's instruction to the jury regarding the issue of drug dependency?

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APPLICABLE STATUTES
(Not already in Petitioner's Brief)

Connecticut General Statutes §53a-13. Insanity as defense.

> In any prosecution for an offense, it shall be a defense that the defendant, at the time of the proscribed conduct, as a result of mental disease or defect lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. As used in this section, the terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Connecticut General Statutes §53a-54a. Murder defined. Affirmative defenses. Evidence of mental condition. Classification.

> (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

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Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed. 2d 235 (1979) 2, 4

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

A. Statement of Facts

The respondent adopts the statement of facts as set forth by the Supreme Court of the State of Connecticut as contained in Appendix A of the petitioner's brief pages 2A through 4A.

B. Regarding Petitioner's Statement of the Case and Argument.

At the outset the Court should be aware that petitioner's brief is fraught with inaccuracies regarding statutes, facts, cases and the opinion of the Connecticut Supreme Court.

Examples of such are as follows:

a) On page 5 of his brief petitioner incorrectly lists the title of Section 53a-10 of the Connecticut General Statutes as "Affirmative Defense." The title is simply "Defense" and the statute has nothing to do with affirmative defenses at all.

b) In his statement of facts he quotes the facts as found by the Connecticut Supreme Court but omits significant findings of the Court obviously harmful to the defendant, such as:

1) on page 6 he omits the words, "Seeing this patently furtive conduct," Defendant's Appendix p. 2A third line from the bottom.

2) on page 8 he omits the phrase, "both of whom (police officers) were familiar with the defendant and his drug related activity," Defendant's Appendix middle of page 3A.

3) on page 9 he omits the phrase "Contrary to the statement in the defendant's brief," Defendant's Appendix A ninth line from the bottom, p. 4A. Thus indicating that defendant misquoted the facts in his brief to the Supreme Court of Connecticut.

c) On pages 10 and 11 of his brief defendant purports to recite the trial court's charge to the jury. It is suggested this Court compare that paraphrase of the charge with the actual charge as quoted in Defendant's Appendix A, footnote 17 at page 20A.

d) On page 12 the defendant states that the Supreme Court of Connecticut treated the drug dependency issue as an "Affirmative Defense." A reading of Section 53a-12 "Defenses; burden of proof." and the Court's opinion will disclose that the Court did not declare the issue of drug dependency to be an affirmative defense. Rather, it merely required the defendant to produce sufficient evidence to raise the issue of drug dependency and thus required the state to disprove that defense beyond a reasonable doubt. Defendant's Appendix A pages 23A-24A, Defendant's Brief page 5.

e) On page 12 of his brief the defendant claims that the Supreme Court of Connecticut's decision is controvention of this Court's decision in *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed. 2d 235 (1979). He fails to point out that the factual situation in *Sanders* is completely different and easily distinguishable from that in the instant case, as will be more fully developed at a later point in this brief.

II. ARGUMENT

A. THE SUPREME COURT OF CONNECTICUT DID NOT COMMIT ERROR IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS TEN POUNDS OF MARIJUANA SEIZED FROM THE FLOOR OF THE FRONT SEAT OF THE DEFENDANT'S AUTOMOBILE.

The decisions of the United States Supreme Court and other federal courts are not in conflict with the holding of the Connecticut Supreme Court in the present case.

The rule that probable cause to search plus exigent circumstances justifies a search without a warrant was followed here. The facts disclose that the defendant's automobile was parked in a public commuter parking lot. The defendant volunteered to the officer that he had ten pounds of marijuana in the front seat area of the vehicle in a plastic garbage bag, which the officer had already seen. All of this, plus the officer's own observations of the furtive conduct of the defendant and his recollection that the defendant had been previously arrested by him and previously convicted of a drug related offense were more than ample to establish probable cause that the vehicle contained contraband.

The finding that probable cause existed is in accordance with this Court's decisions regarding what constitutes probable cause. *Texas v. White,* 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed. 2d 209 (1975); *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970); *United States v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed. 2d 598 (1976).

Regarding exigent circumstances, the court not only found the same to be present, but even articulated the specific circumstances which constituted the exigency. The defendant's Cadillac was not only capable of self

propulsion, but it was parked on easily accessible property open to the public as in *Cardwell v. Lewis,* 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed. 2d 325 (1974) wherein seizure of a motor vehicle from a parking lot was upheld. Moreover, the Cadillac, which was neither owned by, nor registered to the defendant, could have been moved by its owner or a confederate of the defendant and its contents forever lost had the police not seized it at the time of the defendant's arrest. Where the police have a right at least to immobilize the vehicle, the Supreme Court has stated that "there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." *Chambers v. Maroney,* supra, quoted in *Cardwell v. Lewis,* supra, 594.

Defendant's Appendix A pp. 12A-13A.

The Connecticut Supreme Court considered and rejected defendant's arguments that the seizure of the plastic bag in the front seat without a warrant violated this Court's holdings in *United States v. Chadwick,* 443 U.S 1, 97 S.Ct. 2476, 53 L.Ed. 2d 538 (1977) and *Sanders,* supra. It stated that unlike the foot locker found in the trunk of Chadwick's automobile and the closed suitcase found in the trunk of the taxicab Sanders was riding in, the plastic garbage bag here was apparently not even tied closed.

Defendant's Appendix A. Footnote 11, p. 14A.

B. THE SUPREME COURT OF CONNECTICUT DID NOT ERR IN AFFIRMING THE TRIAL COURT'S REFUSAL TO SUPPRESS THE INCULPATORY STATEMENTS MADE BY THE DEFENDANT TO THE POLICE OFFICER.

The defendant argues that when he entered the police car and asked the officer if he could talk to him and then volunteered the information that he had ten

pounds of marijuana in the front seat of his car, his fifth amendment rights were violated under *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

In *Miranda* and subsequent cases clarifying that decision, two conditions must be satisfied before a suspect is entitled to the warnings required by *Miranda*: the suspect must be in police custody; *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed. 2d 714 (1977), *Beckwith v. United States*, 425 U.S. 341, 344-48, 96 S.Ct. 1612, 48 L.Ed. 2d 1 (1976); and the suspect must be subjected to interrogation. Neither condition was present in the instant case.

In *United States v. Mendenhall*, 446 U.S. _____, 100 S.Ct. 1870, 64 L.Ed. 2d 497 (1980), the defendant, meeting the profile for persons unlawfully carrying drugs, was approached in the airport concourse by agents. She was asked for identification and questioned. She was asked to accompany the agents to an office and consented to a search which produced drugs. The conviction was upheld.

The court stated that as long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion on that person's liberty or privacy as would under the Constitution require some particularized and objective justification. *United States v. Mendenhall*, supra, 100 S.Ct. 1870, 1877, 64 L.Ed. 2d 497, 509.

In the present case, the defendant was not in custody. He asked to enter the police car and he initiated the conversation in which he then volunteered the inculpatory information. Clearly this is a case in which there was no holding of the defendant in custody. Before he entered the police car he was freely wandering around the parking lot. Instead of being subjected to police interrogation he requested permission to speak to the officer. He then volunteered the information that he had ten pounds of marijuana in the front seat of his car.

C. THE SUPREME COURT OF CONNECTICUT DID NOT ERR IN APPROVING THE TRIAL COURT'S INSTRUCTION TO THE JURY ON THE ISSUE OF DRUG DEPENDENCY.

The charge to the jury as found in the Defendant's Appendix A, footnote 17, p. 20A states that the accused's status as a drug dependent person at the time of the offense is an exception to the statute's prohibition and that, by operation of Connecticut General Statutes §19-474, the initial burden of producing evidence of drug dependency rested upon the defendant.

The Connecticut Supreme Court ruled that the status of the defendant with respect to drug dependence is not an essential element of the crime charged upon which the state bears the initial and ultimate burden of proof. The existence of that fact does not form a part of the conduct prohibited by the statute. The prohibited conduct is the possession of a certain quantity, one kilogram or more, of a cannabis-type substance with the intent to sell. The trial court concluded and the Supreme Court affirmed, that drug dependency was an exception to or exemption from the general prohibition of that statute, Connecticut General Statutes §19-480a(b), and that Connecticut General Statutes §19-474 had the effect of placing the burden on the defendant to produce some evidence of drug dependency at the time of the offense.

It did not declare proof of drug dependency to be an affirmative defense as claimed by the defendant. Rather the Court placed it under Connecticut General Statutes §53a-12 (a), which, like the insanity defense, Connecticut General Statutes §53a-13, requires the defendant to initially assume the burden of proof and produce substantial evidence of drug dependency as a mitigating factor, at which time it becomes an issue in the case. The state then has the burden to disprove it beyond a reasonable doubt. Defendant's Appendix A, pp. 23A-24A.

The constitutionality of allocating to the defendant the burden of proof on this mitigating factor is without doubt. The United States Supreme Court decision in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed. 2d 281 (1977) regarding the defense of extreme emotional disturbance as a mitigating factor in a murder case, establishes the right of the state to require the defendant to assume the burden of proof with respect to an affirmative defense.

Placing the burden of proof on a defendant, as to a fact peculiarly within his knowledge, does not deny him the benefit of the presumption of innocence. The decisions are manifold that within the limits of reason and fairness the burden of evidence may be lifted from the state in criminal prosecutions and cast on the defendant. The limits in substance are these, that the state shall have proved enough to make it just for the defendant to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience, or of the opportunities for knowledge, the shifting of the burden will be found to be an aid to the accusor without subjecting the accused to hardships or oppression. *Morrison v. California*, 291 U.S. 82, 88-89, 54 S.Ct. 281, 78 L.Ed. 664 (1934).

III. CONCLUSION

For the foregoing reasons it is respectfully requested that the petition be denied.

Respondent,
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